

*Cindy Cabales v. Carriage Homes: CV 060844*

The parties to this litigation have agreed to the form of judgments for all plaintiffs except plaintiff Cindy Cabales (“Cabales”) who now seeks entry of judgment on her behalf following completion of the jury trial. Plaintiff’s case involved a suit for damages regarding the purchase of her home in Nipomo, which is subject to flooding. Plaintiff’s claims included breach of warranty, strict liability, negligence, and negligent misrepresentation.

Unlike the other plaintiffs, Cabales’ purchase included an addendum whereby she agreed to accept the property in its existing condition and also to hold defendant Carriage Homes (“Carriage”) harmless from any liability for future damages from flooding and from all costs of correcting the drainage. Carriage used the hold harmless as an affirmative defense (release) to Cabales’ complaint and also as the basis for a breach of contract cause of action in its cross-complaint.

Accordingly, the jury was instructed on Carriage’s breach of contract cause of action (CACI Nos. 300, 303, 335 and 350). Pursuant to CACI No. 350, the jury was instructed that if Cabales breached her contract, then Cabales could not recover from Carriage on her claim for flood damage to her property. In conjunction with the breach of contract instruction, Cabales requested (and the Court allowed) an instruction on fraud (CACI No. 335), the premise being that no contract was created because Cabales’ consent was obtained by fraud.

Over Carriage’s objection, the jury was also provided instructions, as well as a special verdict form, regarding negligent misrepresentation (CACI Nos. 1903, 1904, 1905, 1096, 1907, 1908, 1920 and 1923) which respect to written and oral statements made to prospective purchasers of Carriage’s homes.

During deliberations, the Court received jury questions nos. 4 and 6, indicating that the jury was seeking clarification regarding a potential conflict in the instructions. Specifically, the jury inquired as to whether it should consider Cabales’ claims if the jury determined that Cabales breached the contract, and also whether the damages should be \$0 because of CACI No. 350. Upon consultation with and stipulation of counsel, the Court informed the jury that it should consider the evidence separately for each cause of action, and that the jury should answer verdict forms for all causes of action even if it found that Cabales breached her contract on the cross complaint.

Thereafter, the jury returned a special verdict finding Cabales breached her contract to hold Carriage harmless. While there was no special verdict form on the fraud claim, it is clearly implied that the jury rejected Cabales’ claim of fraud when it found Cabales breached the contract. However, the jury also returned a special verdict finding that Carriage negligently made a false representation of an important fact to Cabales, and it awarded Cabales \$281,000 in damages on that claim.

Carriage urges that judgment should be entered in its favor because of the jury's finding on the cross complaint, which trumps the verdicts on Cabales' behalf. However, that is not how the Court interprets the jury's verdicts because there is an important distinction between the fraud instruction (CACI No. 335) and the negligent misrepresentation instruction (CACI No. 1903).

The fraud instruction identifies a specific representation regarding the cause of the 2001 flood and Carriage's *intentional* failure to disclose Hermrick Creek's contribution to the flood. The negligent misrepresentation instruction does not define the representation, but only requires the finding of a *negligent* misrepresentation regarding an "important fact" that Carriage had no reasonable grounds for believing was true. It is not inherently inconsistent for the jury, based upon the instructions given, to determine Carriage was not guilty of fraud, but did make a negligent misrepresentation of an important fact.

A hold harmless agreement that exempts a party from liability for his or her own untrue positive assertions, made in a manner not warranted by the information, is void as against the policy of the State of California. (*Blankenheim v. E. F. Hutton & Co.* (1990) 217 Cal.App.3d 1463, 1473) It would therefore appear that Carriage's liability for negligent misrepresentation eviscerates Cabales' agreement to hold Carriage harmless.

Cabales' counsel is instructed to prepare and bring to the hearing a judgment consistent with this tentative ruling. The Court also anticipates that the issue now before the Court will be more fully explored in post-trial motions following entry of judgment.